BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RODRIGO S. GARZA	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,005,730
	)	
IBP, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent requested review of the August 12, 2004 Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Appeals Board (Board) heard oral argument on January 11, 2005.

APPEARANCES

Michael G. Patton of Emporia, Kansas, appeared for claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This is an alleged series of accidents "beginning May 28, 2002, and continuing each day worked thereafter."[1] The ALJ utilized August 23, 2002, the last day claimant worked for respondent as the date of accident.

[1]K-WC E-3 Application for Preliminary Hearing (filed Dec. 13, 2002).

In the August 12, 2004 Award the ALJ determined claimant sustained a 78 percent permanent partial disability based upon a task loss of 56 percent averaged with claimant's actual 100 percent wage loss. The court adopted the task loss opinion of Dr. Ketchum, the treating physician appointed by the court. In arriving at said percentage the court averaged the doctor's opinions using both the task list of Bud Langston and the revised task list of Dick Santner, respondent's and claimant's respective vocational experts .

Respondent argues that claimant's carpal tunnel injury is not work-related. This is supported by the testimony of Dr. MacMillan. Respondent further contends that if claimant did suffer injury as alleged, he nevertheless is not entitled to a work disability award in excess of his functional impairment rating because he did not make a good faith effort to find appropriate employment post-injury and has the ability to earn a comparable wage as a truck driver.

Respondent also argues that claimant's task loss is less than that found by the ALJ. Respondent argues the 35 percent task loss opinion given by Dr. Ketchum using the task list prepared by Bud Langston is the most credible.

Conversely, claimant argues that despite his good faith effort he could not find work within his restrictions post-injury. Therefore, his actual wage loss of 100 percent was properly utilized by the ALJ. As for task loss, claimant argues that the higher percentage given by Dr. Ketchum using Dick Santner's task list would be appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board concludes that the ALJ's Award should be affirmed and adopts the findings and conclusions of the ALJ.

Claimant began working for respondent "on or about January 15th of 2002."[2] Claimant was hired as an operator for a machine called the 8300 that bags meat. There are two people assigned to the 8300 machine. The bags have different types of meat with different weights. Claimant testified the minimum weight of the bags is 50 pounds. These bags came to claimant on a conveyor belt. Claimant's job was to get the bags and the product loaded into the machine and when it comes out of the machine it is sealed up. Claimant testified this required him to use his hands all the time. Claimant regularly worked five days a week, for a total of 40 hours a week.

[2] P.H. Trans. at 6 (Oct. 18, 2002).

Before claimant began working for respondent he had been a brick mason "about three years, off and on."[3] Claimant testified he had a previous accident in 1990. It was to his shoulder and neck and claimant believed the problem to be a herniated disk. Claimant said he recovered from that injury and that he never had hand problems before the current work-related injury with respondent. Claimant worked for respondent for two and one-half months before reporting his symptoms and there is no medical evidence or testimony that claimant's condition pre-existed his employment with respondent.

Claimant testified he first started noticing numbness in his hands either around April 30th or the first week in May 2002 and went to the nurses station. However, respondent's nurses' chart notes reflect April 3, 2002, as the first time claimant reported symptoms.[4] He experienced a loss of strength in his hands. Claimant testified he would have a glass in his hands and he would drop it. The nurses station treated claimant with medications, hot and cold packs and scheduled him to come back later in the day. When claimant returned to the nurses station he brought his supervisor with him and they filled out an accident report form together.

Thereafter, respondent put claimant on a smaller bagging machine. Claimant believed he was on that machine approximately two (2) weeks. Claimant testified he did complain to the nurses station once during the two (2) week period. He was given medications and sent back to his job. Claimant testified he was taken off the smaller bagging machine completely and given light duty, which entailed keeping his area clean, the department clean, picking up trash and wiping belts. After a month of being treated by the nurses station and taking medications to no avail claimant eventually was sent for medical attention by respondent.

Claimant was sent to J. Rob Hutchison, M.D. on May 28, 2002, for complaints of bilateral shoulder and hand pain. Claimant reported a tingling sensation in his hands which radiated up his arms to the shoulders. The symptoms were worse at night. Dr. Hutchison diagnosed bilateral carpal tunnel syndrome with the left worse than the right. He prescribed pain medication and had claimant put on light duty with restrictions. Claimant was to use bilateral wrist splints both day and night. Claimant was requested to return for followup in one week.

Claimant saw Dr. Hutchison next on June 4, 2002. At that time claimant reported the numbness of his hands as being significantly worse than on the last exam. Dr. Hutchison noted claimant had subjective decreased light touch sensation over the distribution of the median nerves bilaterally. The Phalen and Tinel tests were positive. He noted claimant's grip strength was good and there was no evidence of muscle atrophy or

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[3] *Id.*at 27.

[4] *Id.* at 12.

motor deficit. He treated claimant with medications and continued him with wrist splints and work restrictions already established. Dr. Hutchison requested bilateral upper extremity EMGs and requested claimant to followup in two weeks after the EMG studies.

Claimant was seen on June 17, 2002, by Vito J. Carabetta, M.D., for EMG and nerve conduction studies. Dr. Carabetta is board-certified in physical medicine and rehabilitation. The tests revealed claimant had carpal tunnel syndrome in both his hands and wrists and that it was judged to be moderate on the right side and severe on the left side.[5]

Claimant was seen for followup by Dr. Hutchison on June 18, 2002. Claimant reported the numbness was not any better and continued to bother him at night. Claimant also reported being uncomfortable during the daytime with stinging and burning in the nerve distribution. Dr. Hutchison noted the EMG revealed bilateral median nerve abnormality, left worse than right. Dr. Hutchison recommended an orthopedic consultation with Dr. MacMillan and continued claimant with the same work restrictions and treatment. Dr. Hutchison did not recommend further treatment plans until after the orthopedic consultation recommendations were available. There were no further followup appointments with Dr. Hutchison's office.

Claimant first saw orthopedic surgeon, Jeffrey T. MacMillan, M.D., on July 12, 2002. At that time Dr. MacMillan took claimant's history and performed an examination. In his report of July 12, 2002, he noted there was no obvious soft tissue swelling or tenderness about either hand or wrist. Dr. MacMillan noted claimant had a negative Tinel's sign at both wrists and both elbows but there was a positive Phalen's sign bilaterally. Dr. MacMillan's diagnosis was bilateral carpal tunnel syndrome. He continued claimant on current light duty. He discussed treatment alternatives with claimant, including their potential risks and benefits. Claimant indicated that he would like to proceed with the carpal tunnel release procedure.

In his August 7, 2002 letter to respondent Dr. MacMillan noted he had reviewed a videotape of claimant's job and believed it was unlikely that claimant's carpal tunnel symptoms were the result of his work-related activities with respondent, but said he had no conclusive evidence to support his view. Claimant was terminated from respondent on August 23, 2002, as respondent could no longer provide claimant with light duty work.

Claimant saw Lynn D. Ketchum, M.D, on October 30, 2002, at the request of his attorney. Dr. Ketchum is board-certified in plastic surgery and his specialty is in hand surgery. Dr. Ketchum reviewed prior medical records and examined claimant. Dr. Ketchum testified his examination confirmed claimant did have bilateral carpal tunnel syndrome which Dr. Ketchum believed claimant developed from his work with respondent.

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[5] P.H. Trans. at 25.

He recommended a bilateral staged carpal tunnel release which included a flexor tenosynovectomy to remove the thickened flexor tenosynovium. Dr. Ketchum felt the surgery would give claimant the best chance of returning to the work force with a minimal chance of getting recurrent carpal tunnel syndrome.

Claimant next saw Dr. Ketchum on January 27, 2003, for the purpose of surgery on the left wrist. At that time Dr. Ketchum performed a left carpal tunnel release and flexor tenosynovectomy. Claimant had the same procedure on his right upper extremity on March 7, 2003, with a followup appointment on May 19, 2003. At the followup examination claimant did have swelling in his hands and Dr. Ketchum injected medication into the right wrist to decrease it. Dr. Ketchum removed a suture at the time and wanted to re-evaluate claimant in 3 weeks.

Claimant saw Dr. Ketchum on June 23, 2003, at which time claimant reported he felt a lot better than he did before surgery and that he could tell the difference. Dr. Ketchum removed another subcutaneous suture on that day. He did not feel like claimant was completely healed. Dr. Ketchum believed claimant needed to be seen one more time in about two months, and at that time he did return claimant to work with restrictions of no repetitive gripping for two months and no lifting over 10 pounds.

Claimant returned August 25, 2003, for the followup visit which was claimant's last evaluation by Dr. Ketchum. Claimant did report continuing improvement. His grip strength was 55 on the right, 50 on the left, which was not normal but a definite improvement. Dr. Ketchum testified a normal grip strength would be 90 on both left and right. Claimant still had some scar tissue and tightness in his right wrist. His nerve conduction studies were repeated which showed an improvement from his preoperative status to where he improved from severe on one side and moderate on the other to mild. Dr. Ketchum did feel that as of August 25, 2003, claimant had achieved maximum medical improvement. Dr. Ketchum testified that based on the *Guides*[6] and the combined values chart claimant has a 10 percent permanent partial impairment of each upper extremity for a rating of the whole person of 12 percent.

Dr. Ketchum addressed claimant's need for permanent work restrictions in his letter of September 18, 2003. He recommended no continuous gripping and no lifting over 30 pounds. No continuous gripping means more than 66 percent of the time during a regular eight (8) hour workday. Using Dick Santner's revised task list Dr. Ketchum testified claimant could no longer perform ten (10) out of 19 tasks to arrive at a 53 percent task loss. Utilizing Bud Langston's task list Dr. Ketchum determined claimant could no longer perform ten out of 17 tasks to arrive at a 59 percent task loss.

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[6] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Upon cross examination, Dr. Ketchum equivocated somewhat on several tasks depending upon how many hours a day the task was performed. But his opinion did not change if the task was performed in conjunction with other repetitive or hand intensive tasks. When taken together, they met the definition of constant and thus violated his restrictions. As the court said in *Haywood*, "K.S.A. 44-510e allows for aggregation of job tasks in determining an employee's task loss."[7] The Board agrees with and affirms the ALJ's finding of a 56 percent task loss.

Claimant was examined by Peter V. Bieri, M.D., on November 21, 2003, at the request of his attorney. Dr. Bieri is board-certified as a independent medical examiner. Although claimant remained symptomatic, Dr. Bieri considered claimant to be at maximum medical improvement at the time he examined him. Claimant told him that the surgeries were somewhat beneficial. Dr. Bieri was of the opinion that claimant's bilateral carpal tunnel condition was work-related.

Dr. Bieri opined that based on his evaluation of claimant, his review of the medical records, claimant's history, and utilizing the *Guides* claimant suffered a 15 percent upper extremity impairment bilaterally for residuals of entrapment neuropathy. This translates to nine percent whole person impairment bilaterally. Dr. Bieri testified this combines to a total whole person impairment of 17 percent and is attributable to the injury as reported. Dr. Bieri noted claimant had been released with permanent restrictions to include no continuous gripping and no lifting over 30 pounds. Using the revised task list prepared by Dick Santner, Dr. Bieri testified based on 19 total tasks claimant has lost the ability to perform ten (10) tasks for a 53 percent task loss.

At the request of claimant's attorney he was interviewed on October 15, 2003, and January 19, 2004, by Dick Santner a vocational consultant for the purpose of developing a job task list based on a 15-year history. Mr. Santner testified that he compiled the first task list October 15, 2003, then claimant testified at the regular hearing and it was determined claimant had more jobs so Mr. Santner revised the list, which is the January 19, 2004 list.[8] Mr. Santner determined, utilizing Dr. Ketchum's restrictions, claimant could perform jobs that range in pay "from $5.75 per hour to approximately $7.00 per hour. These would include various fast food positions, pizza delivery, office cleaning. . . all of which are essentially entry level and unskilled jobs."[9] This took into consideration the records of Drs. Hutchison, MacMillan and Ketchum.

At respondent counsel's request claimant met with Bud Langston, a vocational rehabilitation consultant on February 12 and February 25, 2004. Mr. Langston did not

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[7] *Haywood v. Cessna Aircraft Co.,* 31 Kan. App. 2d 934, Syl. ¶ 8, 79 P. 3d 179 (2002).

[8] Santner Depo. at 8 and 9.

[9] Santner Depo. Ex. 2.

determine what claimant's wage earning ability is currently. He indicated that he would determine claimant's earning capacity after completion of his vocational rehabilitation plan.[10] Mr. Langston also testified that claimant, upon completion of his rehabilitation plan, would have the ability to earn $25,000 to $30,000 annually working as an over-the-road truck driver.[11] However, if claimant works for a bus company he can expect to earn between $23,000 and $25,000 annually.

Claimant testified that he was terminated by respondent on August 23, 2002, and he has not worked since. He was released with permanent restrictions by Dr. Ketchum on August 25, 2003. Thereafter, he registered with job service and utilized its computerized job listings and placement services on almost a daily basis. In addition, he would make cold contacts on his own and seek leads from friends and through his church. Claimant also received job placement assistance from Mr. Langston, who testified claimant was making a good faith effort to find work. The Board agrees and finds claimant has met his burden of proving he has made a good faith effort to find appropriate employment. Therefore, the Board likewise affirms the ALJ's finding that claimant's actual post-accident earnings should be utilized to determine his wage loss. As claimant has not found work, his wage loss is 100 percent. When averaged with his 56 percent task loss, the result is a 78 percent work disability as found by the ALJ.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated August 12, 2004, is affirmed.

IT IS SO ORDERED.

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[10]Langston Depo. at Ex. 2.

[11]Langston Depo. at 26.

Dated this _____ day of March 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael G. Patton, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director